United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76 1436

To be argued by:
Jay Topkis

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL,

Defendants-Appellants.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF THE DEFENDANTS-APPELLANTS

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JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL, :

Defendants-Appellants. :

- -x

BRIEF OF DEFENDANTS-APPELLANTS

Statement of Jurisdiction

This is a criminal appeal arising from acts allegedly committed in the course of labor-management controversies in a small aviation business in upstate New York. Defendants appeal from a judgment of the District Court for the Northern District of New York (MacMahon, J.) whereby defendant employers were convicted of substantive crimes and conspiracy in violation of the Railway Labor Act, 45 U.S.C. § 152. Defendants were sentenced to fines totalling $105,000; defendant Winston was sentenced to 15 days in jail, and defendant Bell received a suspended jail term.

This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

Preliminary Statement

This is the first prosecution in a quarter-century under the criminal provisions of the Railway Labor Act and is only the second indictment in the 43 years that the statute has existed. The only other prosecution ended in a $2,000 fine for a corporate defendant. This is assuredly the first case in which an employer has been sentenced to jail for what would amount in any other context to an unfair labor practice.*

Trial under this statute being without precedent, it is not surprising that a variety of legal problems should have plagued the trial. The trial court expressed its concern at the close of the Government's case (864):**

> "I would like to say that this case raises a myriad of legal problems which the United States attorneys' office hasn't even seen, much less been of any help to the Court."

As the trial court recognized, the most fundamental of these problems was the definition of the crime (1758):

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* Thanks to the cooperation of Government counsel, we can advise the Court that the only other prosecution in the history of the statute was a two-count indictment filed on January 31, 1952 in the Eastern District of Louisiana, New Orleans Division, No. 24270, naming as defendants Taca Airways Agency, Inc., G.R. Woody and Rudolph O. Duscoe. As a result of plea negotiation, the corporate defendant pleaded nolo contendere on February 13, 1952, and was fined $1,000 on each count; the indictment was nolle prossed as to the individual defendants.

** The number in parentheses refers, here and hereafter, to the pages of the Appendix. Pages 1a through 12a of the Appendix consist of the docket entries, the indictment and the judgments; 1 through 2160 of the trial transcript; 1e through 82e of the designated trial exhibits.

> "I do not know who selected this case for prosecution in this district, but you [the prosecutor] are trying to define, for the first time, the element[s] of the crime."

After struggling with the question, the trial court came to a conclusion which, we submit, cannot be correct. In substance, the court instructed the jury that they could convict defendants if they found that defendants had committed an unfair labor practice (as defined in civil cases) and if they so found beyond a reasonable doubt.

We shall demonstrate that this instruction is erroneous, as a matter of Congressional intent, statutory construction and common sense.

While it is not surprising that an unprecedented prosecution should raise difficult issues of law, it is quite surprising that the Government selected this case as the vehicle for breathing life into this dormant criminal statute. There was here no physical violence, actual or threatened, no bribery, no electronic surveillance -- none of the egregious misbehavior with which the reports of labor relations cases are filled.

Rather, the charge here is essentially that seven employees were fired for organizing activity. We do not mean to suggest, of course, that employers deserve medals when they fire employees for union activity -- only that there is nothing in this charge, were it true, to warrant criminal, rather than

civil, sanction.

Furthermore, the evidence that defendants discharged any employees other than for proper business reasons is terribly thin. The Government in effect asks this Court to hold, as it argued to the jury in summation (1974), that the discharge of any employee after organizational efforts have begun would constitute a crime -- a discharge for union activity.* Not even any civil case has ever so held.

The Government also contends that defendants coerced their employees by means of threatening speech. This charge, too, has scant support in the record. Defendants did indeed speak to their employees to persuade them to vote against the union -- but that speech is protected by the First Amendment.

We contend that a fair reading of this record shows (a) defendants should not have been indicted in the first place, because the evidence that they did anything wrong is inadequate to ground a conviction; and (b) their convictions were the result of substantial violations of their constitutional and statutory rights, the most glaring of which were the application of criminal sanctions to protected speech and the trial court's erroneous definition of the elements of crime.

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* Said Government counsel: "Any decision to fire co-pilots after the date of this letter [the first piece of pro-union literature] would have been an obvious interference [with the right to organize]."

The Issues on Appeal

I. Was the evidence sufficient to sustain the jury's verdict on the substantive counts, under the trial court's instructions?

We contend that it was not.

II. Did the trial court's instruction to the jury -- which permitted defendants to be convicted without proof that they were aware of their legal obligations under the Act, without proof that defendants knew that a discharged employee was engaged in union activity and without proof that defendants acted solely for anti-union reasons -- correctly define the elements of the crime?

We contend that it did not.

III. Does the First Amendment require that the convictions on the conspiracy count be reversed?

We contend that it does.

IV. Does the First Amendment require that the convictions on the substantive counts be reversed?

We contend that it does.

V. May an employer be convicted of violating 45 U.S.C. 152(3), which prohibits interference with employees' choice of a representative, because he discharged an employee after the employees have exercised that choice?

We contend that the answer is "No."

VI. May two corporate entities be prosecuted for violating the Railway Labor Act where all the proofs demonstrate that they did not owe distinct duties under the Act but instead were treated by the responsible federal authorities as one entity?

We contend that the answer is "No."

VII. May an employer be convicted, consistent with the constitutional guarantee against double jeopardy, of interfering with his employees' attempt to organize and, in a separate count based on the same facts, of interfering with his employees' attempt to choose their representative?

We contend that the answer is "No."

Statement of the Case

Broome County Aviation, Inc. and Commuter Airlines, Inc. (together, "the Company") are the corporate embodiments of a small aviation business headquartered in Binghamton, New York. Broome provides charter service, sells fuel and does maintenance; Commuter provides scheduled service between upstate New York and New York City and Washington, D.C., among other places (1386-87). All of the stock of Broome is owned by defendant Winston; all of the stock of Commuter is owned by Mrs. Winston (62e). Defendant Theodore Bell is the Company's chief pilot, in charge of operations (1004). The Company employs approximately two dozen pilots, as well as mechanics and other ground staff (1388-89).

In the fall of 1974, the co-pilots and captains (together, "the pilots") employed by the Company began to consider forming a union. By an application dated October 2, 1974, the Airlines & Aerospace Employees Union, Teamsters Local 732, asked the National Mediation Board to take the steps necessary to hold an election (63, 264-66, 6e).

Company management was opposed to unionization and attempted to persuade the pilots to vote against the union. On October 5, Winston explained the Company's position at separate meetings of the co-pilots and the captains (444-74, 1721-32).

There is no dispute concerning the content of his speeches,* which argued principally that the pilots did not need a union. Bell also spoke, very briefly, at the October 5 meetings. He reminded the pilots that he had helped them in the past and said that he needed their help now, by voting against the union (472-73). On October 19, Winston spoke again to the pilots. He described how a West Coast airline similar to the Company had to sign a labor contract with the Teamsters Union which was unrealistic, and how the airline quickly lost $18 million and went out of business (676, 728, 731-32). Winston told the pilots that, if the the Company were faced with similar demands, he would have to close down or cut back (1737-41, 1896-97).

Subsequently, Winston met individually with many of the pilots, as he had frequently done in the past (449, 1348-49, 1420, 1430). He repeated the Company's position, and asked how the pilot felt; if the pilot said that he was not in favor of the union, Winston reminded him that he could vote against the union by handing over his ballot to the Company, and Winston urged him to do so (340, 359, 391-92, 532-33, 623-24, 679-80, 771-72, 816-17, 1266-67, 1366-67). Many of the pilots who

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* Unknown to Winston, one of the co-pilots tape-recorded most of what Winston said to that group (318-19). There is a gap in the tape, which appears to consist solely of Winston's reading from a text prepared by the Company's labor counsel (1723-32).

turned over their ballots subsequently applied to the National Mediation Board for duplicate ballots (66-68, 346, 564-65). The Teamsters' representative had advised the pilots that they could turn over their first ballots and vote duplicates (1289).

On November 25, the National Mediation Board counted the ballots and found that sixteen out of the twenty-one eligible pilots had voted for the union (69). On December 4, 1974, the Board certified the union as the representative of all pilots (69, 17e).*

To this summary of the facts must be added the dismissals of seven pilots -- two before the election and five long after. The evidence indicates, we submit, that defendants discharged these men for sound business reasons.

Nevertheless, on July 2, 1975, defendants were indicted under the criminal provision of the Railway Labor Act,

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* The Company challenged the result of the election by letter dated December 9, 1974, relying on statements by seven pilots that they had voted against the union (1759-64, 19e). The Board investigated, and, on January 3, 1975, concluded that the election had been proper. The Board's count was correct, and the Company's wrong, because three pilots, captains Solberg, Kleitz and Floto, had misled the Company concerning their votes. On January 9, 1975, the Board wrote to the Company confirming the certification of the Teamsters Union (77-83, 29e).

45 U.S.C. § 152(10), which makes criminal a "willful" refusal to comply with other subsections of Section 152.* The Company is subject to the Railway Labor Act by virtue of 45 U.S.C. §§ 181 and 182, which broadened the Act's jurisdiction to include airlines. The Railway Labor Act is roughly analogous to the National Labor Relations Act, except that the latter has no parallel criminal provision.

Counts 2 through 8 of the indictment (7a) charged that Winston and the corporate defendants discharged seven pilots in violation of subsection 152(3) -- which provides that an employer may not "interfere with, influence or coerce [its employees] in [their] choice of representatives" -- and subsection 152(10). Counts 10 through 16** (7a-8a) charged that Winston and the corporate defendants discharged those same seven pilots in violation of subsection 152(4) -- which provides that an employer may not "influence or coerce employees in an effort to induce them . . . not to join or remain members of any labor organization" -- and subsection 152(10). Bell was not named as a defendant in any of these substantive counts.

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* The whole of Section 152(10) is set forth, along with other pertinent statutory material, in the addendum to this brief.

** In Counts 9 and 17, the Government charged that the defendants criminally discharged an eighth employee, Paul Floto. The Government withdrew these charges at the close of its case and they were dismissed (686).

Count 1 (4a-6a) was grounded on 18 U.S.C. § 371 and charged that all defendants, including Bell, conspired to violate the Railway Labor Act by threatening reprisal if the employees organized, by asking pilots for their ballots, and by firing pilots.

The case was tried to a jury in Auburn, New York from June 1 through June 17, 1976, the Honorable Lloyd F. MacMahon presiding. On June 17, the jury found defendants guilty on all 15 counts which were submitted (2160-62).

On September 16, 1976, Judge MacMahon sentenced Winston to fifteen days imprisonment on each count, the sentences to run concurrently, and $5,000 fine per count, a total of $75,000. Commuter Airlines, Inc. and Broome County Aviation, Inc. were each fined $1,000 on each count -- $15,000 per corporate defendant. Bell was given a six-month suspended sentence of imprisonment and was placed on probation for three years (9a-12a).

POINT I

THE EVIDENCE WAS INSUFFICIENT TO FIND THAT ANY OF THE DISCHARGES WERE CRIMINAL EVEN UNDER THE TRIAL COURT'S BROAD DEFINITION OF THE SUBSTANTIVE OFFENSE

Under the trial court's broad -- and erroneous -- definition of the substantive offenses, the Government had to

prove as to each count, inter alia, that Winston and the Company (a) either knew or strongly suspected that the discharged pilot was engaged in union activity and (b) discharged the pilot wholly or partly for anti-union reasons (2139).

We submit that the evidence was insufficient so to prove.

The Pre-Election Discharges

Two of the discharges for which Winston and the Company were convicted occurred prior to the election -- those of Robert Slough and Ira Josephson. The evidence is clear, we suggest, that Slough, Josephson and one other pilot, Michael Baan (whose dismissal the Government does not challenge), were all discharged on October 3, 1974 as part of a Company-wide reduction of staff made necessary by economic facts:

In Spring 1974, Winston formulated plans to expand the Company's business and to open new routes, to Cleveland and Boston among other cities (1400-01). He ordered two new, sophisticated aircraft ("Metros") and hired twelve additional pilots, including Slough and three of the other pilots whose discharges are here at issue (1401-02, 850-52; Govt. Ex. 40).

By September 1, however, the business picture had

changed considerably, making expansion much more of a risk.* Shortly before September 20, the deadline for notifying the Official Airline Guide concerning Fall-Winter flight schedules (1917), and before there was any indication of union activity, Winston decided to abandon his route-expansion plans and to reduce the Company's labor force (1401, 1415, 1918). It was undisputed that the planned new routes were not put into operation.

On about September 30, Winston and Bell discussed what flight personnel should be let go (1459, 1850). Winston decided, based on a review of the comparative merits of all the pilots, to terminate captain Baan and co-pilots Slough and Josephson (1457). Baan was chosen because he was the last pilot hired and the Company had invested no time in training him (1457). The evidence indicates that Slough and Josephson were chosen because their performance records were not good:

Josephson: Josephson admitted at trial that Winston told him, more than a month before he was terminated, that his

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* IBM had decided not to use the Company's aircraft on a new route for which Winston had been negotiating (1402-04) and also to cancel substantial business it had done with the Company in the past (1404-05). Another customer, Public Loan Service, decided to reduce its business with the Company (1403-07). There were indications that other customers, particularly two construction businesses, would also be flying less (1412-13), and the general economic climate was not favorable for expansion (1399-1401). The variable interest payments on the new Metros had increased substantially, as had operating costs (1408-10).

performance was unsatisfactory (188); Captain Jan Solberg testified that Josephson had "frozen" on a flight from Newark to Elmira in the spring of 1974. The weather was bad, Josephson became nervous, and Solberg tried to calm him down. When it came time to take off, Josephson refused to fly. Solberg took off nonetheless, and reported the incident to defendants (772-75). Josephson admitted that on several occasions he had changed the work schedule to substitute another co-pilot's name for his own, over Bell's objection (217-19). There was additional evidence of Josephson's comparatively poor performance (203-04, 1105-11, 1144-45).

Slough: Slough admitted at trial that he had complained about being assigned to collect fares and make out receipts (part of the regular duties of a co-pilot) and that he had sometimes addressed those complaints to passengers (115-16, 176); and that shortly before he was discharged, he was "on call" but did not notify the Company of his whereabouts, in violation of Company rules (110-12, 155). Captain Reeve testified that Bell had reported complaints about Slough's flight procedures long before October 3 (1373-74). At the time he was terminated, Slough had been with the Company for only six months and was on probationary status (105, 169-70).

The business reasons for the firing of Slough,

Josephson and Baan are confirmed by the fact that the Company also reduced its ground staff: from October 1974 through March 1975, the line staff was reduced from nine employees to five, and the mechanics from sixteen to twelve (1454-55, 1328-29).

The Government claimed that defendants discharged Slough and Josephson because of their participation at an initial union organizational meeting held at the Holiday Inn in Vestal, New York, beginning at about 8:00 P.M. on October 2, 1974 (99, 252-53). There was testimony that Slough and Josephson attended this meeting and that the representative of the Teamsters Union, Alexander Calder, mentioned their names during the course of his speech (107, 184). The meeting went on past midnight (253); defendants discharged Slough and Josephson (and Baan) at 9:00 A.M. and 10:30 A.M. that morning (151, 213).

To prove that defendants knew of the union meeting when they discharged Slough and Josephson, the Government relied on one unlikely piece of evidence and on several inferences:

On September 24, Slough had written an anonymous letter urging the pilots to organize (92). No one helped him write the letter, and no one knew he was its author (137). Slough testified that, a few days later, he told Captain John Harrington that he and three other pilots had written the letter (126). Slough also testified that, when Bell told him on

October 3 that he was discharged, Slough protested that he was being discharged for having written this letter and Bell replied that the letter had nothing to do with it, but, in any event, he thought the other three pilots wrote the letter (97-99, 163).

From this evidence, the Government asked the jury (1964-65) to infer the following:

> (a) Because Slough testified (99) that he told only Harrington that the September 24 letter was written by Slough and the three other pilots, Bell must have obtained his understanding on this point from Harrington;
>
> (b) Harrington acted as a "spy" on behalf of defendants, reporting all union activity to them;
>
> (c) As Harrington attended the October 2 meeting, he must have reported Slough and Josephson's participation to defendants in the few early morning hours between the end of that meeting and their dismissal.

Besides the fact that Slough's testimony on this point is inherently not credible,* the Government's argument is contrary to an array of proof:

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* There is no reasonable explanation why Slough would have lied to Harrington. In summation, the Government argued that Slough lied in order to expose Harrington as a spy by his transmitting false information (1964). This cloak-and-dagger explanation is most unlikely: (a) it is highly improbable that Harrington would be "exposed" by Bell's repetition of such misinformation; (b) such a plan would have been premature, as no other organizational activity had taken place when Slough lied to Harrington; (c) furthermore, it is unlikely that Slough would have admitted writing the letter, and implicated others, had he thought Harrington was a "spy." Slough's testimony was contradicted by both Harrington and Bell, who each denied discussing the letter with Slough (1237, 1277-78).

(1) The evidence, summarized above, that Slough and Josephson were laid off as part of a Company-wide reduction of staff.

(2) Harrington testified that he did not report to defendants on the October 2 meeting (1282), and Winston and Bell testified that they were unaware of the October 2 meeting when Slough, Josephson and Baan were discharged (1042-43, 1067, 1720).

(3) In order to schedule the October 3 morning meetings at which the dismissed pilots were given notice of their termination, Bell had to adjust the flight schedule so that Bell (who regularly flew for the Company) could meet with Slough, Josephson and Baan at the Company's office in Binghamton that morning. Bell prepared the October 3 flight schedule at 5:00 P.M. on October 2, as is the regular course of business -- before the meeting on the night of October 2 (1040, 1068-69).

(4) Pilot Michael Baan was also dismissed on the morning of October 3. According to his own testimony, Baan spoke against the union at the October 2 meeting (243). If defendants' dismissals on October 3 were motivated by anti-union animus, why did they dismiss Baan? Indeed, if they were aware of his speech and if their actions were motivated by anti-union animus, defendants would have retained Baan -- and his vote.

The Post-Election Discharges

Winston and the corporate defendants were convicted of discharging five pilots subsequent to the election and the certification of the union. The evidence showed that each of these dismissals was for good and proper cause.

Co-pilot Paul Sholl: Winston discharged Sholl on December 9, 1974 -- two weeks after the National Mediation Board counted the ballots, and three days after Sholl was responsible for damage to a Metro aircraft that endangered the safety of

passengers and crew. At the termination of a flight into Binghamton on December 6, Sholl opened the door of the Metro aircraft, and the door fell to the ground (360). Sholl claimed that he opened the door properly (362). After investigating the incident, Winston came to the conclusion that only negligence or a willful act could account for the damage to the door, and that Sholl had failed to report the full extent of the damage, which failure could have lead to further problems (1769-73). Winston immediately dismissed Sholl (360). The inspector from the Federal Aviation Agency who later investigated the incident agreed with Winston. His report stated (1120):

> "I do not know if [the door's falling] were willful, but in my opinion, the broken door handle could not be caused by the action described by the co-pilot [Sholl] .... In my opinion, the failure was not caused by normal wear or use."

Captain William Lamos: Winston discharged Lamos on December 13, 1974, immediately after Lamos admittedly refused to test fly a plane, as required by federal safety regulations (398, 401). Lamos refused to conduct this test flight "because it would delay me by thirty-five to forty minutes" (397).*

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* Lamos had just flown from Newark to Binghamton and was scheduled to change to a smaller plane for the last leg to Elmira (423-24). That plane had just undergone major repair (400), and Federal law requires that, whenever major repair is done, the plane must be test flown before being used for passenger service (401). The plane subsequently failed the test flight which Lamos refused to perform (441-42).

As Winston was in a meeting at the time, Lamos reported his refusal to Mrs. Winston, who is a Company employee (433). Lamos admits that he was "pretty mad" (432-33), and that his argument with Mrs. Winston became so heated that he felt obliged to return the next day (the day after he was discharged) and apologize to Mrs. Winston* (434). Concerned for Mrs. Winston, a secretary in the office interrupted Winston's meeting (1383). Lamos and Mrs. Winston explained the argument to Winston, and Winston fired Lamos on the spot (398).

Co-pilot Ronald Williams: Williams was discharged on January 9, 1975 because the Company continued to be over-staffed and Williams was not much of a pilot. Williams had been a co-pilot with the Company part-time since the late 1960's and full-time for more than three years (530). The Company required that a co-pilot either obtain an Airline Transport Rating ("A.T.R.") from the Federal Aviation Agency, and advance to the position of captain, or seek employment elsewhere (599-602). Williams had been warned that he should obtain his A.T.R. (549), and so, in the summer of 1974, he enrolled in a special two-month course in Florida aimed at that goal (549-50). There he took

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* Lamos could not recall whether during this argument he called Mrs. Winston a liar (433). The secretary present during this incident testified that Lamos did call Mrs. Winston a liar (1380-83).

the A.T.R. tests, passed the written part after one failure, but failed the flying part twice (551-53). After returning to the Company following these failures, Williams seemed uninterested in continuing his A.T.R. training (578-81, 605), or in flying (616-18).* Winston had wanted to discharge Williams in October 1974 instead of Slough or Josephson, but Bell persuaded Winston that Williams should be given another opportunity to work for his A.T.R. (1789-90). Two and one-half months later, Williams had taken no steps to do so. As the Company continued to be overstaffed, Winston discharged Williams on January 9, 1975 (1790-91).

Co-pilots Dennis Larimore and James Hummel: In mid-February, Winston decided that, in light of the economic situation, the Company still was overstaffed and two co-pilots should be let go. After another comparative review of the pilots, Winston decided that Larimore and Hummel should be terminated (1798, 1806).

Only a few days earlier, Larimore had had an argument with Harrington concerning the dismissals of Sholl and Williams, Larimore maintaining that they were discharged for anti-union reasons (658). According to Larimore, the conversation became "heated" (658) and Larimore told Harrington: "I

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* Williams was employed at the time of the trial as a camp owner (530).

hope that . . . the son of a bitch [Winston] would get what was coming to him" (641, 659-60). Captain Pusztai overheard this argument; he testified that Larimore was "very excited" and "sounded threatening" (1252).

Larimore and Hummel were both on probationary status when they were discharged on February 17, 1975 (620, 670, 1800).

When Hummel was hired, as part of the anticipated expansion program, he had only 40 hours of multi-engine flying time, whereas the Company required a co-pilot to have 100 hours (722). During his few months with the Company, Hummel had flown as co-pilot on the mail route, which normally does not have a co-pilot, in order to qualify him to fly as co-pilot on passenger flights (723).

Such is the critical evidence as to the pilots terminated post-election. To be sure, there was also some evidence that Sholl, Lamos, Williams, Larimore and Hummel had engaged in some union activity: like the other pilots, these men had attended some union meetings -- months before they were discharged (356, 381-82, 621-22). But there was no evidence to link that activity to their dismissals. The Government argued in its summation (1961-63) that these men were singled out because they were the ones who refused to turn over their

ballots to defendants. But the fact is that Sholl, Larimore and Williams did not refuse to do so,* and that Lamos' and Hummel's "refusal" consisted of telling Winston that they were listening to both sides and wanted more time to think about their choice (391, 679-80). At a second meeting, Lamos told Winston that his vote was "a personal matter." (392).

* * *

This evidence would not support a finding that defendants committed a civil, unfair labor practice. A fortiori, we submit, defendants cannot be found guilty of crimes under the Railway Labor Act.

1. The Government failed to establish that defendants either knew or strongly suspected that Slough or Josephson had engaged in union activity. The only basis in the record for such a finding consists of three inferences: (a) the "spy" inference; (b) the "small plant doctrine" inference; (c) the coincidental timing inference.

(a) In civil cases, an inference that an employer knew of an employee's union activity may not be drawn from the possibility that someone might have informed the employer about the employee's union activities. American League

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* Sholl told Winston that he had already mailed in his ballot and had voted against the union (359). Larimore also told Winston he had mailed his ballot, and Winston replied that he did not want to know how Larimore voted (623-24). Williams gave Winston his ballot (533).

of Professional Baseball Clubs, 189 N.L.R.B. 541, 1971 CCH N.L.R.B. ¶ 22,905 (1971). There, umpires Salerno and Valentine initiated efforts to organize the American League umpires. Their attorney sent letters to the chiefs of each umpire crew stating that certain unnamed umpires had consulted him about forming a union. Salerno and Valentine informed the chiefs that they would be receiving that letter. Salerno then attended a meeting of umpires, where he stated that he was present to represent the umpires who wanted to form a union. A few days later, the President of the American League fired Salerno and Valentine. The Board held that the evidence of wrongdoing was insufficient, because there was no evidence that anyone had informed the League's management of Salerno and Valentine's activity, 1971 CCH N.L.R.B. at 29,646 (emphasis added):

> "What the evidence did show was that there were a number of possible ways that Cronin and Hubbard might have learned of the union activities if any one of a number of persons communicated information they had to the officials. Some umpires knew of the roles of Salerno and Valentine in the organizational activities, and a larger number of umpires knew of Salerno's role in both the early activities and the later effort to bring the American League umpires into the Association. However, an inference of knowledge may not be drawn from the possibility that someone may have been an informer."

Accord: N.L.R.B. v. Ray Smith Transport Co., 193 F.2d 142, 145 (5th Cir. 1951); N.L.R.B. v. Ace Comb Co., 342 F.2d 841, 848 (8th Cir. 1965). In the case at bar, the evidence was much weaker than in the cited cases -- for the only evidence which

indicated that there was even an opportunity for communication was Slough's hardly credible testimony.

(b) The trial court instructed the jury that, in deciding whether defendants knew of union activity by any of the discharged pilots, they "should consider the size of the Defendant companies, the number of [its] employees . . ." (2138). In civil cases, this "small plant doctrine" inference is held to be inapplicable to an off-the-premises meeting such as the October 2 meeting at the Holiday Inn. As the First Circuit wrote in N.L.R.B. v. Joseph Antell, Inc., 358 F.2d 880, 882 (1st Cir. 1966) (refusing to enforce the Board's order with respect to the discharge of a shoe salesman who urged his fellow employees to join a union at an off-the-premises meeting and who was discharged two days later because the company was overstaffed):

> "Actually, the term small plant doctrine is quite misleading. The smallness of the plant, or staff, may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question ... This can have no application to an off-hour, off-the-premises, meeting [citations omitted]. To apply a small plant rule in such circumstances would in effect put an entirely arbitrary burden on operators of small establishments -- a burden that we could not support."

(c) While the Government argues that the timing of Slough and Josephson's discharges is inculpatory, in fact the timing cuts the other way: It is difficult to conceive that defendants learned of the meeting and formulated an anti-union

plan in the few hours after midnight and before 9:00 A.M.* But even if the Government were entitled to this inference, it would be insufficient to make out a civil violation. As the court wrote in N.L.R.B. v. Ace Comb Co., 342 F.2d 841, 848, (8th Cir. 1965):

> "[C]oincidence in time between Union activity and discharge does not in itself raise an inference of knowledge on the employer's part of the Union members without some direct evidence of knowledge. N.L.R.B. v. Falls City Creamery Co., 207 F.2d 820 (8th Cir. 1953)."

In Falls City, the court refused to enforce the Board's order concerning two employees who were discharged the day after they began a general solicitation of employees. See also, Solo Cup Co., 208 N.L.R.B. 976, 1974 CCH N.L.R.B. ¶ 26,214 (1974).

2. The Government also failed to prove that the discharges of Sholl, Lamos, Williams, Larimore and Hummel were wrongful.

In N.L.R.B. v. Garner Tool and Dye Mfg. Inc., 493 F.2d 263, 268 (8th Cir. 1974), the court held that management properly dismissed an employee who called the company's

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* And there was additional evidence concerning timing which is solely exculpatory: Bell had scheduled the meetings at which Slough, Josephson and Baan were notified of their dismissal before the October 2 meeting, and Winston decided to reduce the staff before September 20, at a time when there was no evidence of organizational activity (1040, 1068-69, 1917-18).

president a son of a bitch, although the dismissal occurred only a few days after organizational efforts had begun and the discharged employee had acted in the past as spokesman for the employees. The Court wrote:

> "[T]he Board's findings may not rest on suspicion, surmise [or] implications . . . [citations omitted]. And . . .[c]ircumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding."

The "evidence" that defendants discharged Sholl, Lamos, Williams, Larimore and Hummel for anti-union reasons is no more than suspicion, surmise and implication.

Not only was the Government's proof insufficient to demonstrate the essential element of anti-union motivation, more importantly, the uncontroverted evidence established that, with respect to at least three of the discharges, the misconduct which precipitated the dismissals was so egregious as to make the discharge lawful per se. Because it was patent that (a) Sholl was discharged for his mishandling of the door, (b) Lamos was fired for insubordination and abusiveness to Mrs. Winston, and (c) Larimore was dismissed for his defamatory remark, these discharges could not constitute unfair labor practices. Frosty Morn Meats, Inc. v. N.L.R.B., 296 F.2d 617 (5th Cir. 1961). In that case, the co-leader of an organizational drive was discharged three days after the first union

meeting and immediately after he refused an order to perform a chore which was his responsibility. There was evidence that the discharged employee had previously been uncooperative. Judge Wisdom, writing for the court, refused to enforce the Board's order, 296 F.2d at 621:

> "If . . . the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union, since all will understand that the employee would have been fired anyway."

See also, N.L.R.B. v. Park Edge Sheridan Meats, Inc. 341 F.2d 725, 728 (2d Cir. 1965) (refusing to enforce the Board's order concerning a known union leader who was discharged because his employer discovered that he had a criminal record) ("[I]f an employee is discharged for neglect or delinquency, there is no violation simply because he was engaged in organizing and the employer sheds no tears at his loss.")

In sum, the Government's proofs would not support a finding that defendants committed a civil violation when they discharged the seven pilots in question. But this is not a civil proceeding. This is a criminal prosecution under a statute which requires a willful violation of the law. That being the case, the evidence must be judged against a higher standard. As we shall demonstrate immediately, the Congress

intended that no employer be convicted under this statute unless there was an "array of most convincing proof." We submit that the only fair reading of the proof adduced below is that defendants discharged these men solely for proper business reasons.

Of course, all of the evidence was submitted to the jury and the jury voted to convict on all counts. And normally -- assuming correct instructions -- that would end matters.

But we submit that, in an area where an employer surely has some quite significant rights -- e.g., to talk straightforwardly with his employees, and to fire dangerous pilots even in the midst of an organization campaign -- the courts must deal carefully with those rights on peril of chilling their exercise. Cf., N.L.R.B. v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968) (refusing to enforce the Board's order concerning a union organizer who was discharged for insubordination) ("If we were to draw a further lesson from this case, and too many others like it that we have had, it is that it is all too easy to say that adequate cause for discipline was seized upon as pretextual in the case of union representatives. The fact is that adequate cause for discharge is of peculiarly legitimate concern . . .").

POINT II

THE TRIAL COURT MISINSTRUCTED THE JURY CONCERNING MATERIAL ELEMENTS OF EACH OF THE CRIMES CHARGED

Enacted in 1934, the criminal provision of the Railway Labor Act, 45 U.S.C. § 152(10), provides, in pertinent part (emphasis added):

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third [or] fourth . . . paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense."

Despite the Congress' use (twice) of the term "willful," the trial court failed to instruct the jury, in this first trial under the statute, that willfulness is an element of the offense. According to the trial court (2135-2139), a carrier engaged in interstate commerce, or its agent, is guilty of a federal crime if it interferes with its employees' organizational efforts, such as by threatening speech or the discharge of an employee, and it does so "voluntarily, deliberately and on purpose, and not because of a mistake, accident, carelessness or other innocent reason" (2137). The trial court told the jury that the Government need not prove that the employer was aware

of his legal obligation under the Act (2137), and that it will suffice for conviction if the employer actually knew that a discharged employee was engaged in union activity or if the employer "had a strong suspicion" (2139) of such activity. The trial court instructed further that a discharge is criminal if motivated "wholely or partly" (2137, emphasis added) by anti-union animus.

We submit that this was error. In our view, an employer may not be convicted under the Act unless and until a jury finds, beyond a reasonable doubt and upon proper instructions, that the employer acted knowingly and willfully; that is, (a) he either knew of the legal obligation imposed by the Act and acted with the intent to violate the law, or he acted in obstinate disregard of his legal obligation, and (b) with respect to discharges, he actually knew that the discharged employee was engaged in union activity, and anti-union animus was the sole -- or at least the principal -- reason for the discharge. Because the jury was not instructed that these were essential elements of the crime, the convictions below must be reversed.

By means of written requests to charge submitted early in the trial, defendants requested that the trial court so instruct, except that they made no request concerning whether

anti-union animus must be the sole or principal motivating factor (2157, 76e-82e). Defendants took no exceptions to the charge as given (2156-57), but this probably came about, we suggest, because the trial court had asked counsel to submit written requests (72-73), and they had done so, thereby making their positions known well in advance of the delivery of the instruction. In any event, the plain error rule surely applies to the erroneous definition of material elements of a crime in the first trial under a particular statute. Screws v. United States, 325 U.S. 91, 107 (1945):

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U.S. 189, 200. But there are exceptions to that rule. United States v. Atkinson, 297 U.S. 157, 160; Clyatt v. United States, 197 U.S. 207, 221-222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

Accord: United States v. DeMarco, 488 F.2d 828 (2d Cir. 1973); United States v. Houle, 490 F.2d 167 (2d Cir. 1973), cert. denied, 417 U.S. 970 (1974); United States v. Fields, 466 F.2d 119 (2d Cir. 1972).

The Legislative Background

The legislative history makes it clear that the Congress intended, by use of the word "willfully", to cast the heaviest burden on the Government.

In 1934, Congress amended the Railway Labor Act of 1926 in several respects. It added, inter alia, what are now subsections (3), (4) and (10) of 45 U.S.C. § 152. As Federal Coordinator of Transportation Eastman explained at the outset of the Senate hearings, these amendments were required principally because the 1926 Act "depend[ed] largely upon the good faith and good will of the parties. . . .",* whereas experience during the period 1926-1934 demonstrated that good faith was insufficient to achieve the objectives of the Act.

The spokesman for management at the Hearings was M. W. Clement, Chairman of the Committee of the Railroads Delegated to Deal with Proposed Amendments to the Railway Labor Act. On April 12, Mr. Clement explained to the Senate Committee why management opposed what is now subsection 152(10), Hearings at 66:

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* Hearings before the Senate Committee on Interstate Commerce, 73rd Congress, Second Session, on S. 3266 (hereafter "Hearings"), April 10, 1934, page 10, statement of Federal Coordinator of Transportation Joseph B. Eastman.

> "With this language written into law, there will be no negotiation, in my judgment, between management and committees without the presence of an attorney, because, as a railroad officer myself, I would hesitate to ask officers to enter into any negotiations with any committee without legal advice at all times . . .
>
> "Management, therefore, hesitatingly but definitely recommends that these penalty sections be left out of the proposed amendments to the act, as we believe this is a thing that defeats the purposes of the bill, and very definitely slows down and curtails negotiations between men and management."

On April 19, 1934, Mr. Eastman testified once again and discussed Mr. Clement's suggestion that the penalty provision be deleted, Hearings at 151-52 (emphasis added):

> "Mr. Clement is much concerned about this penalty provision, and thinks it would require the presence of attorneys in negotiations between the men and the managements, in order that the railroad officers might have the safeguard of legal advice at all times. There would be no such need ... .
>
> "To abate Mr. Clement's alarm further, he should note that the penalty paragraph contains the word 'willful'. Experience has shown that it is a difficult matter to secure a conviction with that word in a statute and requires an array of most convincing evidence. If he will read the prohibitions to which they apply, I am sure that he will conclude that he can safely brave the dangers of these penalties without a lawyer constantly at his elbow to give him advice."

At this point, the Chairman of the Committee, Senator Dill -- who had introduced the bill at the request of Mr. Eastman -- interrupted Mr. Eastman, and the following colloquy ensued (Id.):

> "THE CHAIRMAN. Then it is your conclusion that the great handicap which he [Mr. Clement] said this section would cause is not so serious?
>
> "MR. EASTMAN. I don't think so.
>
> "THE CHAIRMAN. I was wondering when he [Mr. Clement] testified if, without going as far as he suggests [i.e., doing away with subsection 10 entirely] there might be something put in to show the liberal intent of Congress in this matter.
>
> "MR. EASTMAN. You have got the word 'willful' in there, and as I say, the Interstate Commerce Commission has had a great deal of experience with enforcing penalties where that word 'willfully or knowingly' is in the act, and you have to have a most convincing presentation of evidence to secure conviction with it in there."

This is the only legislative history we have found which reflects upon the meaning of the term "willful" as used in subsection 10. To recapitulate:

Mr. Eastman* plainly stated to the Committee that the term "willful," as used in this statute, required an extraordinary standard of proof. The Chairman of the Committee, who introduced the legislation, plainly stated that it was the intention of Congress not readily to expose management to criminal sanctions. Mr. Eastman assured the Chairman that the term "willful" accomplished that purpose.

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* Mr. Eastman has been cited as reliable authority in several decisions construing other provisions of the 1934 amendments to the National Railway Act. See, e.g., Machinists v. Street, 367 U.S. 740, 751-53 (1961); Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 451 (1946).

United States v. Murdock, 290 U.S. 389 (1933), shows the precise meaning which Mr. Eastman, and the Congress, meant to convey. Murdock was a prosecution under Section 1114(a) of the Internal Revenue Act of 1926, which makes it a criminal misdemeanor "willfully" to fail to supply information required by law concerning a tax return. In holding that the defendant could not be convicted if he were not aware of his legal obligation to supply the information, the Court marshalled prior case law and stated a general rule of construction, 290 U.S. at 394-95 (emphasis added):

> "The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose ... without justifiable excuse ... stubbornly, obstinately, perversely ..." [citations omitted].

Applying this standard to the case before it, the Murdock Court wrote, 290 U.S. at 396:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his [legal obligation], should become a criminal by his mere failure to measure up to the prescribed standard of conduct.... It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

It was only a few short months after Murdock was decided in December 1933, that the Congress enacted subsection 10 of the Railway Labor Act, making a "willful" violation

of subsections 3 and 4 a federal crime.*

We submit that the colloquy between Mr. Eastman and Senator Dill, together with the Supreme Court's contemporaneous definition of "willful" in a criminal statute, conclusively establish that it is an essential element of the crime that a carrier be aware of its obligations under the Act and act in spite of that awareness.

We submit further that the trial court's instruction concerning what the Government must prove about the employer's knowledge and intentions also is inconsistent with the Congress' intention not readily to subject employers to criminal sanctions. The doctrines relied on by the trial court -- that proof

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* United States v. Philadelphia & R. Ry. Co., 223 Fed. 207 (E.D. Pa. 1915), one of the cases cited in Murdock, was a prosecution under a statute prohibiting the willful failure to comply with certain standards for the shipment of animals in interstate commerce. The court found the evidence insufficient to establish a willful violation, stating, 223 Fed. at 210:

> "The act of omission committed by defendant was 'knowingly' done. 'Willfully,' however, is an attitude of mind and will. It carries with it the thought of an intentional ignoring of the law, or of indifference to its provi ions. There is nothing to justify such a finding in this case."

This may have been one of the Interstate Commerce Act cases to which Mr. Eastman referred in his Senate testimony.

that the employer knew that the discharged employee was engaged in union activity is not necessary; that such knowledge may be inferred from the size of the defendant's business; and that anti-union animus need be only part of the reason for the discharge -- were each developed many years after the enactment of subsection 152(10), under the National Labor Relations Act, and only because enforcement of employees' rights in administrative proceedings might prove troublesome without these relaxed evidentiary standards.* But the Congress intended that the criminal provision of the Railway Labor Act be applied only when the case was egregious and upon "an array of most convincing evidence". Accordingly, these doctrines have no place in a criminal proceeding under subsection 10 of the Railway Labor Act.**

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* As to the doctrine that actual proof of knowledge is not required, see, Wiese Plow Welding Co., 123 N.L.R.B. 616, 618 (1959).

As to the "small plant doctrine," see, N.L.R.B. v. Abbott Worsted Mills, Inc., 127 F.2d 438 (1st Cir. 1942).

As to the doctrine that a discharge is wrongful if motivated only partly by anti-union animus, see, N.L.R.B. v. Whitin Machine Works, 204 F.2d 883, 885 (1st Cir. 1953).

** We should note also that it follows from the instruction to which defendant was held in Murdock to be entitled, that reliance on advice of counsel is a defense in a criminal prosecution under the Railway Labor Act.

However, should any doubt still exist concerning the meaning of "willful" as used in subsection 10, the following should erase that doubt:

1. The statutory framework of the Act reflects that "willful" means just what Mr. Eastman and Murdock said it means. Consider the penalty which Congress fixed -- a fine from $1,000 to $20,000 and/or imprisonment for up to six months,

> ". . . for each offense, and each day during which such carrier, officer or agent shall wilfully fail or refuse to comply [with the statute] shall constitute a separate offense."

Such a per diem penalty is none other than a remedy for contemptuous wrongdoing. See, e.g., Frank Irey, Jr. Inc. v. Occupational Safety & Health Review Commission, 519 F.2d 1200, 1207 (3d Cir. 1975), aff'd en banc, 519 F.2d 1215, cert. granted on other grounds, 424 U.S. 964 (1976) (holding that 29 U.S.C. § 666(e) requires a "knowing, conscious, and deliberate flaunting of the Act.") ("It is obvious from the size of the penalty which can be imposed for a 'willful' infraction . . . that Congress meant to deal with a more flagrant type of conduct. . .").

Consider also the range of remedies for the enforcement of employees' rights available under the Act:

> (a) The National Mediation Board may set aside an election improperly influenced by an employer. See, e.g., Allegheny Airlines, Inc., N.M.B. Case No. R-3470 (1962); Chicago & Southern Airlines, N.M.B. Case No. R-1955 (1948).

(b) A labor union may bring an action to set aside an election, and a court may enjoin further violations of the Act. See, e.g., Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930); Myers v. Louisiana & A. Ry. Co., 7 Fed. Supp. 92 (W.D. La. 1933).

(c) A labor union may bring an action seeking reinstatement and back pay on behalf of an employee improperly dismissed. See, e.g., National Airlines Inc. v. International Assoc. of Machinists and Aerospace Workers, 430 F.2d 957 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971).

(d) An aggrieved employee may bring an action seeking reinstatement and back pay. See, e.g., Cunningham v. Erie R.R. Co., 358 F.2d 640 (2d Cir. 1966); Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974); Watt v. Trans World Airlines, 66 Labor Cases ¶ 11,949 (S.D.N.Y. 1971).

(e) The Government may initiate criminal proceedings under subsection 10 of the Act.

In short, there is a broad range of enforcement devices, and the criminal provision would appear to be a procedure of last resort, to be applied only in those cases in which the wrongdoing is contemptuous of the law. See, e.g., United States v. Bishop, 412 U.S. 346 (1973) (following Murdock with respect to another criminal provision of the tax laws, 26 U.S.C. § 7207).

2. The criminal provision makes sense only if interpreted to require willful wrongdoing, as defined in Murdock. As interpreted in the trial court, the Act would be a minefield, capable of exploding at any moment in the face of an employer subject to its jurisdiction.

The courts have long recognized how fine the line is between legality and illegality in this area. With respect to the discharge of employees, the Supreme Court has stated that forbidden "[e]ncouragement and discouragement are subtle things, requiring a high degree of introspective perception." Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 51 (1954). With respect to employer speech, this Court has recognized that "[s]tatements likely to produce fear of retaliation are often hard to distinguish from innocuous prophecy regarding the economic effects of unionization." N.L.R.B. v. Yokell, 387 F.2d 751, 756 (2d Cir. 1967). In the highly charged arena of labor-management relations, the trial court would have a jury determine criminal responsibility solely on the basis of these ephemeral distinctions and under the loose evidentiary standards noted above.

We submit that Chief Judge Cardozo's observation concerning whether a certain civil liability should be imposed is fully applicable to the issue at bar, Ultramares Corporation v. Touche, 255 N.Y. 170, 179-180, 174 N.E. 441, 444 (1931):

> "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."*

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* It is not only employers who would face undue danger, as may be illustrated by the case of co-pilot Paul Sholl. Sholl was negligent in his handling of a door to an airplane after a landing on December 6, 1974. An investigation by the

(Footnote continued on next page)

There is no good reason, moreover, why the law should require that these risks be run. The tests for determining whether conduct is objectionable in a civil proceeding were designed to insure that employees' rights were not illusory and that elections take place under "laboratory conditions". General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). More than forty years of experience demonstrate that we may trust to the civil remedies of the Act to attain these objectives, and that there is no compelling need to imprison an employer who is found, under such loose evidentiary standards, to have committed an unfair labor practice.

(Footnote continued from previous page)

Federal Aviation Agency so concluded (1120). There was also evidence that, following the accident, Sholl reported to management only that the door handle had broken, while in fact the airplane was not safe to fly until the entire door had been replaced (1766-73). Defendants discharged Sholl three days later, immediately after they had completed an investigation. In short, Paul Sholl was dismissed because he had shown himself to be less than careful and because lack of care by a pilot can cause death or severe injury to passengers and crew alike. If the trial court's definition of the offense is sustained, management will be reluctant to dismiss the Paul Sholls of the world without ironclad proof of egregious wrongdoing. And even that proof may not be a defense to criminal prosecution -- for, under the instruction given to the jury here, derived from civil proceedings, it is a federal crime to dismiss an employee for good cause "if an intention to ... coerce ... plays any part in the Defendant's motivation." (2132, emphasis added). If such be the law, it will take a fair amount of courage to fly with an airline whose employees are engaged in an organizing effort.

3. Well-established canons of construction require that the criminal provision of the Act be construed narrowly to require willful wrongdoing.

If the Act is not so construed, it would be unconstitutional on both vagueness and First Amendment grounds. Concerning vagueness, subsection 152(10) suffers from the same vice as the statute at issue in Screws v. United States, 325 U.S. 91 (1945), which makes it unlawful "willfully" to deprive a person of a constitutional right. While the Supreme Court recognized in Screws that existing case law provided "a source of reference for ascertaining the specific content" of the forbidden action, it noted that "[t]hat law is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case." 325 U.S. at 96.* To save the statute from being held void

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* Absent a narrowing construction, subsection 152(10) is equally vague. Indeed, professors of labor law -- let alone employers -- find it most difficult to predict what conduct is legal and which illegal. Professor Lev has observed, Suggestions to Management: The Lockout, 19 Labor Law Journal 80, 85 (1968):

> "Probably in no other area of the law are decisions of so little precedential effect than in labor. The circumstances, and the issues to which they give rise, are so complex and dissimilar that the factual coincidence necessary to stare decisis rarely exists. Prediction is practically impossible. One has to get a feel for the general attitude which prompted the decision and then try to fathom how the attitude will bear on a case yet to be tried."

for vagueness, the Court construed it to require that the defendant have a specific intention to deprive the victim of a constitutional right and act "in open defiance or in reckless disregard of" the law. 325 U.S. at 105.

Concerning freedom of speech, we contend, infra, Point III, that an employer may not be criminally prosecuted for speaking too forcefully during a union campaign and that the criminal provision of the Act is unconstitutional if applied to employer speech. If the criminal provision is not unconstitutional as applied to employer speech, it must be narrowly construed to reach only employer speech which is "willfully" improper, as defined above. United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) (narrowly construing another criminal statute in the labor field so as to avoid First Amendment problems).

And other well-established principles of statutory construction require the same result. United States v. Bass, 404 U.S. 336 (1971). "[T]wo wise principles" persuaded the Bass Court to resolve an ambiguity in 18 U.S.C. § 1202(a)(1) in favor of a narrow construction. The first applies generally to criminal statutes, 404 U.S. at 347-48, 349:

> "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

The second principle was that "unless Congress conveys its purpose clearly, it will not be deemed to have . . . meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." 404 U.S. at 349. The convictions below, if affirmed on the trial court's instructions, would expand the criminal provision of the Railway Labor Act beyond its plain meaning and work a significant change in another sensitive relation, that between labor and management. In the absence of clear language so directing, this Court should not take it upon itself to make that change.

* * *

For all these reasons, but principally because it was the intention of the Congress, expressed in the terms of the statute as well as in debate, subsection 152(10) must be construed narrowly. But if we are wrong, if an employer may be imprisoned, for example, because he discharged an employee whom he <u>suspected</u> of union activity, and he did so <u>partly</u> for anti-union reasons and although he was <u>not</u> <u>aware</u> that such a discharge was unlawful, <u>still</u> these first convictions under that surprising construction of the Act may not stand -- because the construction changed the law after the event.

Even the Government thought that the criminal provision of the Act required proof of willful wrongdoing. On the very first day of trial, the Government made an offer of proof

concerning a union election which occurred at the Company in 1970. The court asked counsel to explain the relevance of this evidence, and the following colloquy ensued (59, 61):

> [Counsel for the Government]: "We are not charging any acts in 1970. But we say that we have to prove that the Defendant knew the provisions of the Railway Labor Act, and, in 1970, he was advised of those provisions.... The Government has taken a position that a specific intent is required in this case, and that he has knowledge."
>
> The Court: "I don't think that the Government is right."

Because the trial court's definition of the crime was so unexpected, the convictions below may not stand. Bouie v. City of Columbia, 378 U.S. 347 (1964). Defendants in Bouie participated in a "sit-in" demonstration, refused to leave when asked to do so, and were convicted of violating a State criminal trespass statute which made illegal entry upon property of another after notice was given prohibiting such entry. The convictions were upheld by the South Carolina Supreme Court in a decision which construed the statute to apply to remaining on property of another after receiving notice to leave. The United States Supreme Court reversed, holding that defendants had been deprived of fair notice, and writing, 378 U.S. at 353:

> "[A]n unforeseeable judicial enlargment of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one

> that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed."

Accord: United States v. Jacobs, 513 F.2d 564 (9th Cir. 1975) (applying Bouie to an obscenity prosecution in which the trial court instructed the jury under the Miller standard, whereas the conduct complained of was pre-Miller).

Accordingly, even if the trial court's construction of the Act may be valid for the future, it may not be applied retroactively, for the trial judge was alone in the courtroom in his view of the law.

POINT III

THE FIRST AMENDMENT REQUIRES THAT THE CONSPIRACY CONVICTIONS BE REVERSED

The trial court instructed the jurors that they could find that Winston's and Bell's speeches to the pilots constituted unlawful threats (2121-24). It instructed, further, that they could convict Winston, Bell and the Company on the conspiracy count if they found that the defendants had agreed to interfere with the pilots' organizational efforts, and if the defendants committed any one of the overt acts set forth in the indictment (2147-53). The second overt act charged that Winston and Bell spoke to the pilots on October 5, 1974 (6a). Under

these instructions, then, the jury was free to convict defendants solely of conspiring to threaten the pilots.

Because the jury was permitted to, and in all likelihood did,* convict defendants on the conspiracy count solely on the basis of their speeches to the pilots, this Court should scrutinize most closely both the facts and the Government's novel theory of criminal employer speech.

We contend that such scrutiny reveals three independent constitutional flaws in these conspiracy convictions.

The First Amendment Bars Criminal Prosecution for Employer Speech

An employer has a right, under the First Amendment, to stand before his employees during an organizational campaign and tell them why he believes they should vote against a union. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969); Thomas v. Collins, 323 U.S. 516, 537-38 (1945); N.L.R.B. v. Virginia Electric Power Co., 314 U.S. 469, 477 (1941). However,

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* Bell was not named in any of the substantive counts and there was little or no evidence to tie him to any of the alleged wrongdoing -- except for the speeches to the pilots. Consequently, there is every reason to believe that the criminal agreement found by the jury was limited to a conspiracy to interfere with the pilots' organizational efforts by means of threatening speech.

if an employer's speech goes beyond certain bounds and becomes threatening, an election in which such speech occurs may be set aside, consistent with the First Amendment, in a proceeding adjudicated in the first instance by an expert administrative agency. Gissel, supra, 395 U.S. at 620.

The line between constitutionally protected speech and unprotected threat, as defined in the civil case law, is extraordinarily vague, as this Court has recognized. N.L.R.B. v. Yokell, 387 F.2d 751, 756 (2d Cir. 1967). Largely for that reason, respected members of the academic community have expressed grave doubts that these civil restrictions on employer speech are constitutional.*

Whatever the proper rule concerning restrictions on employer speech in a proceeding to overturn a union election, we submit that the First Amendment bars a criminal prosecution for such speech. For such a prosecution raises acute vagueness problems and would work a real chill on the exercise of constitutional rights.

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* See, e.g., Bok, The Regulation of Campaign Tactics in Representation Elections, 78 Harvard Law Review 38, 67-74 (1964); Summers and Wellington, Labor Law, Cases and Materials (University Casebook Series, 1968 Ed.), pages 443-445; Browne and Sachs, The Suppression of Employer Free Speech - A New Ban On "Conscious Overstatements" and a Caveat Against "Brinkmanship", 15 Villanova Law Review 588 (1970).

"The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." Winters v. New York, 333 U.S. 507, 515 (1948). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617 (1954). Moreover, a vague statute "allows policemen, prosecutors, and juries to pursue their personal predilections." Smith v. Goguen, 415 U.S. 566, 575 (1974). And where First Amendment rights are at stake the requirement of specificity is even more stringent. Smith v. Goguen, supra, 415 U.S. at 573; Cox v. Louisiana, 379 U.S. 536 (1965).

The vagueness of the line between protected speech and unprotected threats presents these problems in an area -- labor-management relations -- in which prejudice may be expected and, consequently, in which definiteness is all the more important.

Furthermore, if the convictions below are sustained, this Court may be sure that employers subject to the Railway Labor Act will avoid any speech which might possibly subject them to the second-guessing of a jury in a criminal prosecution. This is inconsistent with the First Amendment and would leave employees uninformed concerning the costs and risks of unionization.

Because any criminal prosecution under 45 U.S.C. § 152(10) based on speech by an employer creates grave problems of notice and works an impermissible chill on the rights of others, and because traditional civil proceedings represent an effective and less drastic means of securing the objectives of the Act, the First Amendment is a threshold bar to a prosecution for allegedly improper employer speech.*

The First Amendment Protects the Particular Speech at Issue Here

Winston and Bell justifiably relied on their rights under the First Amendment when they stood before the pilots in October 1974, and told them in three separate addresses why management believed that they should vote against the union.

(1) Winston's October 5 Speech

The Government argued to the jury that this speech was "threatening in [itself]" (1953), and asked the jury (1953-56)

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* See, e.g., United States v. Robel, 389 U.S. 258, 268 (1967), holding unconstitutional a criminal statute which forbade members of the Communist Party to work in a defense plant ("[W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."); Martin v. Struthers, 319 U.S. 141, 147 (1943), holding unconstitutional an ordinance making it a crime to knock on doors for the purpose of distributing handbills ("The dangers of distribution can so easily be controlled by traditional legal methods . . . that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.")

to consider particularly two of Winston's arguments:

(a) Winston told the pilots that the Company was a stable business but that he foresaw a depressed economy ahead (464). He mentioned that the environmental movement was adversely affecting the automobile industry, so that there were at that time 30,000 people unemployed in Flint, Michigan, where Buicks were made (464-465). Then he said (464):

> "Now with such treacherous times, do we want to shake the ship here? Do we want to see if we can topple it over so we sink? And that's what this thing is. Instability, we can't afford for somebody to come in here and dictate to us what direction we have to take."

(b) Winston told the pilots that, if the union came in, the Company could not afford to implement plans for expansion, saying: "I can't afford to take that risk. Economic risk with an unstable organization internally that will try to dictate the economic policies of the company." (457).

Under prior decisions of this Court, these statements would not be improper -- indeed, would be constitutionally protected -- in a civil action. In N.L.R.B. v. S & H Grossinger's Inc., 372 F.2d 26, 28 (2d Cir. 1967), management "made several vague and general statements of pessimism about the future progress and growth of Grossinger's if the Union should win the election." Despite the fact that management had in other respects interfered with its employees' efforts to organize, this Court refused to enforce the Board's order based upon management's speech, declaring:

> "These statements do not seem to us to be sufficiently definite to constitute threats. Moreover, the statements did not suggest that the Grossinger management would seek to bring about any of the unfortunate conditions which they feared might occur. Rather than threats the Management's statements seem to have been prophecies of a somewhat shadowy doom."

In N.L.R.B. v. Golub Corp., 388 F.2d 921, 928-29 (2d Cir. 1967), management told its employees that unionization could decrease or wholly eliminate work opportunities, increase work loads, or create rigidity in personnel relationships between management and the employees. This Court refused to enforce the Board's order based upon these statements, writing:

> "Nothing in these communications could reasonably be interpreted as a threat to make the employees' lot harder in retaliation for their voting for the union ... The only fair reading is that the employer would take these steps solely from economic necessity and with regret ... While ... what is in form a prediction could so far outrun any possible basis for it that the Board might be justified in concluding a threat was intended ... this is a principle that must be kept within narrow limits not here approached. Congress did not intend the Board to act as a censor of the reasonableness of statements by either party to a labor controversy even if it constitutionally could."

In Schwarzenbach-Huber Co. v N.L.R.B., 408 F.2d 236, 251-55 (2d Cir.), cert. denied, 396 U.S. 960 (1969), management committed unfair labor practices by reprimanding an employee for union activity and dominating a committee of its employees. Management also told its employees that it was concerned about the future of the business and that it would try to keep the business in operation if the union were elected, but that might not

be possible. This Court refused to enforce the Board's order based on these statements, citing Golub, supra. Finally, in Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263, 274, n. 20 (1965), the Supreme Court indicated that an employer had a right to convey to his employees a management decision to close the business in case of unionization. If such an argument is proper, a fortiori it would seem proper for an employer to state that, if unionization occurs, he will not expand.

There were a few other isolated remarks about the impact of unionization in Winston's October 5 speech. But they were no more specific and no more suggestive that the Company would seek to bring about any unfortunate conditions than the two remarks which the Government relied on in summation. We invite the Court to read Winston's October 5 speech, as captured on tape and as set forth in a text prepared by labor counsel (444-74, 1723-32).

(2) Winston's October 19 Speech

Winston began this speech by describing a contract which a commuter airline on the West Coast, Golden West, had entered into with the Teamsters' Union. Winston described how Golden West lost millions of dollars, could not function under the terms of that contract and eventually had to close down. The Government contends, relying on the inconsistent testimony

of co-pilot Hummel, that Winston proceeded to discuss what would happen if the union won the election. Hummel testified that Winston said:

> (a) Winston had several options if the union were elected, including closing down (673);
>
> (b) Winston would close the Company "before he would sign something that was anything similar to that [the Golden West] contract" (676);
>
> (c) "[T]here was no reference or direct connection" between the Golden West contract and the options Winston spoke of (730).

Winston testified that he told the pilots that he had several options if the union won the election and if the union insisted upon a contract similar to the Golden West contract (1737-41, 1896-97). Other pilots testified that they recalled that Winston emphasized the Golden West contract (1250-51, 1256-58, 1364-71).

If Winston had told the pilots that he would consider closing the Company should the union prevail, that statement concededly would constitute a prohibited threat under civil labor relations law. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618 (1969). If, on the other hand, Winston's remarks were tied to the economic realities of the Golden West contract, they would be constitutionally protected. N.L.R.B. v. Yokell, 387 F.2d 751, 757 (2d Cir. 1967) (refusing to enforce a Board order based on management's statement that if the union were elected

and its demands were too high, there would be cut-backs).

Where constitutional rights hang in the balance, and especially where fact-finding is determinative of whether speech is either criminal or constitutionally protected, an appellate court is duty-bound to undertake the most careful review of the facts.* It just will not do to say that the jury heard the evidence and made its decision. If this Court investigates the facts, it will find nothing terrifying: only the lawful concern of a businessman fearful that the Teamsters' demands might ruin his business as they had ruined Golden West.

(3) Bell's October 5 Argument

About one-half of Bell's remarks were captured on tape. It is undisputed, therefore, that Bell told the pilots on October 5 (472-73):

> "Now, the longer you've been here the more you've benefited by my individual philosophy on all of these occasions here. People who know that I have bent policies, I have bent rules, I have

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* See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235 (1962); Cox v. Louisiana, 379 U.S. 536, 545 (1965); New York Times v. Sullivan, 376 U.S. 254, 285 (1964); Bachellar v. Maryland, 397 U.S. 564, 566 (1970); Greenbelt Publishers Assoc. v. Bresler, 398 U.S. 6, 11 (1970); Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971); United States v. Baker, 364 F.2d 107 (3d Cir.), cert. denied, 385 U.S. 986 (1966); Cousins v. City Council, 466 F.2d 830, 837 (7th Cir.), cert. denied, 409 U.S. 893 (1972).

> done that for them, because I had faith in them as people and professionals and because I believed in it and I still believe in them but we've got this thing coming up and I am sincerely expecting your support. You're going to get a ballot and it's not going to read that way but there is going to be two people running, one of them is Jimmy Hoffa and the other is me, and I am asking you for my support and it's up to you, the decision is with you. If you have appreciated anything I have done for you or everything I have done for you, I am asking for that support now. Thanks a lot for your time."

Co-pilot Hummel took notes on the significant points made at this meeting, so that he could study them when it came time to decide how to vote (691-92). He made no notes on what Bell said and could not recall Bell saying anything beyond what was captured on tape (671, 692-93). Four other pilots, and Bell, testified that Bell said nothing of importance other than what was recorded and quoted above (1054-55, 1265-66, 1285, 1359-60, 1365, 1375). Four other pilots testified -- one and one-half years after the event -- that it was their impression that Bell said in substance that, if the union got in, his supervision of their performance would be stricter (384, 477-78, 751, 798).

We submit that the only fair reading of Bell's statement is that Bell was appealing to the pilots' loyalty and was not suggesting anything at all about his future conduct. The Government in effect so conceded in its summation, where it argued that the pilots "read between the lines." (1958).

We submit that an employer may not be held criminally liable on the basis of speech which is threatening only if "read between the lines."

Because the jury was permitted to convict defendants of conspiring to coerce the pilots solely by means of speech and because the speech proved below was protected by the First Amendment, the conspiracy convictions should be reversed.*

The Trial Court Misinstructed The Jury Concerning the Distinction between Protected Speech And Unprotected Threat

The trial court's instruction concerning the distinction between lawful and illegal speech (2121-24), like the distinction itself, was terribly confusing and, we submit, erroneous.

The court instructed that an employer (2122-23, emphasis added),

> "may <u>even</u> make a prediction that unionization will result in dire economic consequences to the company, so long as his prediction has some reasonable basis

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* And this is true even if only one of the three speeches is protected. <u>Stromberg</u> v. <u>California</u>, 283 U.S. 359 (1931). There, defendant was convicted of displaying a red flag in public for one of three purportedly illegal purposes. The Supreme Court reversed, holding that one of the three purposes was constitutionally protected and that the jury <u>may</u> have convicted defendant on the basis of that constitutionally protected activity.

> in fact and contains no open or veiled threats of reprisal, or coercion or promise of benefit, express or implied, for the employees' exercising or refraining from exercising protected rights, and provided the prediction was not motivated by an intention to interfere with, influence or coerce employees because they have exercised, or are exercising a protected right."

A moment later, the court summarized the issue for the jury as follows: "The essential question here is, what did the speaker intend, and what did he intend the listener to understand?" (2124)

This is an incorrect statement of law. An employer has an absolute constitutional right to make reasonable predictions, regardless of his "intention". N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969). Indeed, it is difficult to conceive of an employer exercising that right without "intending" to "influence" his employees' vote.

This error was compounded in a supplemental charge given in response to an inquiry by the jury. The jury asked the court to clarify the meaning of "choice of representative" as used in subsection 152(3). The court explained to the jury that the employees' choice of a representative "cannot be interfered with by the employer. In other words, he has to leave him alone, as I told you in more detail in the Charge." (2160, emphasis added).

This erroneous definition of the scope of constitutional protection was reversible error, despite the fact that

no objection was taken. "It is axiomatic that when a jury charge deprives an accused of a constitutional right . . . the plain error rule should be applied." United States v. Haywood, 411 F.2d 555, 556 (5th Cir. 1969) (applying that rule where the trial court's instruction denied defendant his constitutional right to be presumed innocent).

POINT IV

THE CONVICTIONS ON THE SUBSTANTIVE COUNTS SHOULD BE REVERSED BECAUSE THE JURY MAY HAVE INFERRED GUILT FROM CONSTITUTIONALLY PROTECTED SPEECH

The Government argued, to the trial court* and to the jury, that the discharges of the pilots had to be seen in light of defendants' other coercive conduct in order to appreciate the illegal purpose behind the discharges. In its summation (1953, 1957), the Government linked, for example, Winston's October 5 speech to the substantive counts.

The trial court permitted the jury to infer guilt on the substantive counts if they found that defendants' speech was unlawfully threatening. The court instructed the jury concerning

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* The argument was first stated in the Goverment's pretrial memorandum in a section captioned "Conduct Of Employer As Evidence Of Intent":

> "It goes almost without saying that the surrounding circumstances must provide the evidence of intent in this case. Other practices of the employer which interfere with, influence and coerce his employees in their choice of representatives and in their organizational activities are evidence that by firing the employees named in Counts II - XVII of the instant Indictment, the employer had the intent required under said counts. The purpose of this portion of the Memorandum is to discuss the law applicable to those practices which the Government will submit create an inference of unlawful intent."

The memorandum proceeded to discuss, inter alia, "Threats of Reprisals," and the analysis of that law began by observing, "One of the most troublesome elements in employer's speech cases has been that of distinguishing between [il]legal threats and legitimate prophesies."

the substantive counts that "[t]he Defendant's motive is the key factor" in determining whether the discharges were lawful or not (2132) and explained that evidence of motive consists, inter alia, "of the reasonable inferences which you draw from the totality of the setting and the circumstances surrounding the discharge . . ." (2132). Summing up, the trial court explained that (2133, emphasis added):

> ". . .a Defendant's true motive, and intent may thus be inferred not only from what he says but also from the way and the time when, and the place where he acts, in the context of all of the surrounding circumstances."

And again: "[I]ntent and knowledge may be inferred from the way a Defendant acts, from the timing of his acts, by his statements and from all of the surrounding circumstances." (2149-50; emphasis added).

In short, the jury was instructed that circumstances and context were critical, that Winston's October 5 speech, for example, could be deemed an unlawful threat, and that they could infer an improper motive for the discharges from such a threat.

We emphasize that October 5 speech not only because we believe it is plainly protected by the First Amendment but also because it was presented to the jury in most dramatic fashion. It is difficult here to convey the aura of suspense and drama that the tape of that speech brought to the courtroom. This methodology itself conveyed the impression that defendants had been "caught in the act" by the tape recorder -- whereas, as a

matter of law, they were merely "caught" exercising their constitutional rights.

In the ordinary case, where there is a possibility of prejudice from joinder of two counts, one of which is subsequently invalidated, the otherwise valid count may be saved only by a "strict" charge segregating for the jury the proofs on each count. Schaffer v. United States, 362 U.S. 511, 516 (1960); United States v. Bentvena, 319 F.2d 916, 955-56 (2d Cir.), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963).

But this is not the ordinary case. In this case, not only did the instruction to the jury permit the jury improperly to infer guilt, but that very inferential process is contrary both to the Constitution and to labor relations law. As the Supreme Court wrote in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (emphasis added):

> "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be, 'evidence of an unfair labor practice' . . ."

Because the trial court permitted the jury to find that speech which is protected by the First Amendment was an unprotected threat and to take that purported threat as evidence of guilt on the substantive counts, the convictions on those counts should be reversed.

POINT V

A VIOLATION OF SECTION 152(3), WHICH PROHIBITS COERCION OF EMPLOYEES' "CHOICE OF REPRESENTATIVES," MAY NOT BE BASED ON POST-ELECTION ACTIVITY

Subsection 152(3) provides that an employer shall not "interfere with, influence, or coerce [its employees] in [their] choice of representatives." Subsection 152(10) makes it a federal crime for an employer willfully to fail or refuse to comply with this obligation.

The indictment charged in counts 4, 5, 6, 7 and 8, and the jury found, that Winston and the Company committed the crime of coercing the pilots "in [their] choice of representatives" by discharging Sholl, Lamos, Williams, Larimore and Hummel (7a).

That charge and that finding are logically fallacious and contrary to the statutory scheme. For these discharges all occurred weeks or months after the pilots had exercised their choice and chosen a representative. Consequently, these discharges could not have influenced -- no less coerce -- that choice.

Consider the chronological sequence:

November 25, 1974	- The National Mediation Board counts the ballots mailed in by the pilots over the past few weeks.
December 4, 1974	- The National Mediation Board certifies the union as the pilots' representative.
December 9, 1974	- Sholl discharged.
December 13, 1974	- Lamos discharged.

January 9, 1975 - Williams discharged.

February 17, 1975 - Larimore discharged.

February 17, 1975 - Hummel discharged.

A dismissal in January 1975 just cannot influence a vote cast in November 1974.

And the statutory scheme of the Railway Labor Act reflects this fact of logic, by providing in subsection 152(4) that certain post-election wrongdoing by an employer is unlawful. That subsection provides that an employer shall not "influence or coerce [its] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . ." Subsection 152(10) makes it a federal crime for an employer willfully to fail or refuse to conform to this obligation.

In short, by applying subsection 152(3) only to its logical, pre-election confines, no damage is done to the statutory scheme -- as is well illustrated by the fact that Winston and the Company were also convicted of discharging Sholl, Lamos, Williams, Larimore and Hummel under subsections 152(4) and (10).*

Subsection 152(3) being inapplicable to post-election action by an employer, the convictions on counts 4, 5, 6, 7 and 8 should be reversed.**

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* Indeed, if subsection 152(3) were held to be applicable to post-election wrongdoing, convictions secured under both subsections (3) and (4) for the same wrongful act would have to be reversed because they would violate the double jeopardy guarantee. See, infra, Point VII.

** Defendants moved before trial, inter alia, to dismiss counts 4, 5, 6, 7 and 8 on this very ground. That motion was denied by Judge Port, without a memorandum opinion.

POINT VI

COMMUTER AIRLINES, INC. AND BROOME COUNTY AVIATION, INC. MAY NOT BOTH BE CONVICTED

Government counsel made no effort at the trial to develop separate cases as against Broome and Commuter -- the testimony treated them as substantially interchangeable. This is understandable: although owned separately by Mr. and Mrs. Winston, they apparently operate as one functional entity.

But on this record the two corporations may not be separately convicted and punished. For evidence which came in almost casually -- not directed to the point -- makes it clear that, as a matter of law, there was only one employer, Broome. We refer to the financial statements of the two corporations for 1974 and 1975 (44e-74e).

Thus the 1974 financial as to Broome notes (49e) that flight personnel of that company voted to affiliate with the Teamsters for collective bargaining purposes -- the vote around which this case is centered. And Broome is revealed to have a pension plan (48e) -- a common concomitant of employer status.

The 1974 financial as to Commuter, by contrast, states (54e):

> "The Company [i.e., Commuter] has no operating organization of its own and owns only two of the aircraft it uses. It purchases its usage of fully manned aircraft and administrative functions from its affiliated corporation, Broome County Aviation, Inc."

It appears, then, that Commuter has no operating employees, a proposition supported by its operating statement which has no salary or other entry under "Cost of Operations" -- only the entry "Services Leased from Affiliate" (55e). And there is no suggestion that any flight personnel of Commuter ever voted for a collective bargaining representative.

The 1975 financials are precisely parallel.

These facts require at the very least, we submit, dismissal of all substantive counts of the indictment as to Commuter -- not being an employer, it could never have fired anyone.

It is significant, we submit, that the National Mediation Board always treated Broome and Commuter as one entity, to wit "Broome County Aviation, Inc. d/b/a Commuter Airlines, Inc." See, e.g., Government Exhibits 6, 8, 10, 14, 22 (7e, 9e, 14e, 17e, 29e). All of the evidence is consistent with the Board's view -- there was but <u>one</u> application for an election; there was but <u>one</u> election; there was but <u>one</u> union certified as the representative of all of the pilots, of but <u>one</u> employer. Nevertheless, <u>two</u> carriers were convicted below of a federal crime and were each sentenced to fines totalling $15,000.

In short, the Government failed to prove an essential element of its case if it wanted to convict Broome <u>and</u> Commuter -- that the two corporate defendants were in fact two distinct entities owing distinct obligations to the Board and to the United States.

In any event, the Government would be estopped from asserting that Broome and Commuter had separate employer identities -- for the Board always treated the two as one entity with respect to the very obligations which are here at issue. Roth v. McAllister Bros., Inc., 316 F.2d 143, 145 (2d Cir. 1963) ("A party having assumed a certain position in a legal proceeding and having succeeded in maintaining that position . . . may not thereafter assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed, especially if the change be to the prejudice of the party who acquiesced in the position formerly taken"); United States v. Pennsylvania Chemical Corp., 411 U.S. 655, 674 (1973) (applying estoppel principles against the Government in a criminal prosecution).

Accordingly, all of the convictions against one of the corporate defendants should be reversed.

POINT VII

COUNTS 2 AND 3 CHARGED AS ILLEGAL THE SAME CONDUCT CHARGED IN COUNTS 10 AND 11, THEREBY VIOLATING DEFENDANTS' GUARANTEE AGAINST DOUBLE JEOPARDY

The trial court instructed the jury (2135-37) that they could find Winston and the Company guilty of discharging Slough and Josephson in violation of 45 U.S.C. 152(3) and (10) (Counts 2 and 3) if they found:

> (1) that the defendant was a carrier or agent subject to the Act,

(2) that the pilots were "exercising their right freely to choose a representative,"

(3) that the defendant discharged co-pilots Josephson (Count 2) or Slough (Count 3),

(4) that the defendant discharged Josephson or Slough intending to interfere with the pilots' attempt to choose a representative.

The trial court instructed the jury (2142) that they could find Winston and the Company guilty of discharging Slough and Josephson in violation of 45 U.S.C. § 152(4) and (10) (Counts 10 and 11) if they found:

(1) that the defendant was a carrier or agent subject to the Act,

(2) that the pilots were "exercising their right freely to organize or to join a labor organization,"

(3) that the defendant discharged co-pilots Josephson (Count 10) or Slough (Count 11),

(4) that the defendant discharged Josephson or Slough intending to interfere with the pilots' effort to organize or join a labor organization.

We submit that in convicting Winston and the Company both on counts 2 and 3 and on counts 10 and 11, the jury convicted defendants twice for the same offense, thereby violating these defendants' constitutional rights.

"Offenses are the 'same' for the purposes of the double jeopardy guarantee when the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other," United States v. Mallah, 503 F.2d 971, 985 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975) (reversing

a conviction for conspiracy where defendant had previously been convicted for what the Court ruled was the same conspiracy). More particularly, "[t]he applicable rule ... where the same act or transaction constitutes a violation of two distinct statutory provisions ... is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

The evidence required to support the convictions on counts 2 and 3 is identical to that upon which counts 10 and 11 are based. Attempting to organize is indistinguishable from attempting to choose a representative, and there certainly is no evidence in this record which is probative as to one of these charges while not probative as to the other.

That being the case, the convictions on counts 10 and 11 should be reversed. See, e.g., Caballero v. Hudspeth, 114 F.2d 545 (10th Cir. 1940) (holding that the charge that defendant transported a woman for immoral purposes in violation of one clause of 18 U.S.C. § 398 was the same offense as the charge that defendant transported a woman with the intent to cohabit in violation of another clause of 18 U.S.C. § 398); United States v. Tonarelli, 371 F. Supp. 891 (D.P.R. 1973) (holding that the charge of importing heroin into the country in violation of 21 U.S.C. § 952(a) was the same offense as the charge of bringing heroin into the country on board a vessel in violation of 21 U.S.C. § 955); State v. Boudreau; 322 A.2d 626 (S.Ct. of Rhode Island, 1974) (holding that the charge of committing a violent

crime in violation of Section 11-47-3 of the General Laws was the same offense as the charge of committing an assault).

CONCLUSION

For the foregoing reasons the judgments of conviction against Jerry Winston, Theodore Bell, Broome County Aviation, Inc. and Commuter Airlines, Inc. should be reversed and the indictment dismissed.

February 22, 1977

Respectfully submitted,

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Statutes Involved

45 U.S.C. § 152(3)

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

45 U.S.C. § 152(4)

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other

contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representaives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

45 U.S.C. § 152(10)

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1436

v. :

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES INC., and THEODORE (TED) BELL, : CERTIFICATE OF SERVICE

Defendants-Appellants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARVIN WEXLER, being sworn, states:

I am an attorney associated with PAUL, WEISS, RIFKIND, WHARTON & GARRISON, attorneys for appellants herein. On March 24, 1977 a clerk employed by my firm personally served two copies of the attached Brief of the Defendants-Appellants, containing revised record references in accordance with Rules 30(c) and 31(b) of the Federal Rules of Appellate Procedure and in accordance with a Stipulation concerning the submission of a deferred Appendix, and also served two copies of the deferred Appendix (one copy of the exhibit volume) on Paul V. French, Esq., United States Attorney for the Northern

District of New York, Office of the United States Attorney for the Northern District of New York, United States Court House and Federal Building, 100 South Clinton Street, Syracuse, New York 13202.

MARVIN WEXLER

Sworn to before me this
24th day of March, 1977.

ANTOINETTE SCAFFIDI
Notary Public, State of New York
No. 41-6779300 Queens County
Certificate filed in New York County
Commission Expires March 30, 1978